DOL Issues COVID-19 Guidance Covering FLSA Obligations When Dealing With Coronavirus and Other Emergencies

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On March 9, 2020, the U.S. Department of Labor’s (DOL) Wage and Hour Division posted a helpful guidance for employers addressing some of the issues they are likely contemplating with respect to employee wages in different COVID-19 scenarios. “COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers” offers answers to a number of questions related to emergencies generally under the federal wage and hour laws. Here is what you need to know:

Pay to Non-Exempt Employees During Closures

Under the Fair Labor Standards Act (FLSA), employers are only required to pay non-exempt employees for hours worked. Thus, if employers are forced to close their businesses temporarily due to COVID-19 issues, they are not required to pay non-exempt employees for hours they do not work, even though they may have been scheduled to work those hours. However, employers should determine any additional pay obligations imposed by applicable state law.

Requiring Salaried, Exempt Employees to Use Vacation or Leave Without Pay During Office Closures

Employers may require exempt staff to take vacation or paid time off (PTO) in the case of an office closure due to COVID-19, whether for a full- or partial-day absence, so long as the exempt employee receives his or her full guaranteed weekly salary. If the exempt employee does not have sufficient vacation time or PTO available, the employee must still receive the full guaranteed salary for any week in which he or she performs any work in order to maintain the employee’s exempt status. The exempt employee does not have to be paid for any week in which no work is performed. Here again, employers should determine any additional pay obligations imposed by applicable state law.

Voluntary or Mandatory Telework Arrangements

The DOL confirms that you may either encourage or require employees to telework as an infection-control or prevention strategy. This includes where you impose such arrangements based on current information from the CDC or state or local public health authorities. The DOL notes that telework alternatives may also be used as a reasonable accommodation. (The Equal Employment Opportunity Commission (EEOC) has also discussed using telework as an accommodation under the
Americans with Disabilities Act (ADA) during an outbreak is its pandemic guidance. However, employers may not make such decisions based on protected characteristics, such as national origin, race, gender, age, or pregnancy status.

**Reimbursement of Telework Expenses**

If you require an employee to work from home, you may not require that employee to pay for or reimburse the company for business expenses of the employer where doing so reduces the employee’s earnings below the required minimum wage and overtime compensation. This means that the costs for internet access, equipment, etc., which are incurred by a non-exempt employee in order to be able to telework cannot reduce their earnings below minimum wage and any required overtime compensation; exempt employees must be paid their guaranteed salary, which cannot be reduced by such costs incurred by an exempt employee in order to be able to telework. In addition, you may not require employees to cover such expenses when the telework arrangement is being offered as an ADA accommodation.

Despite this guidance, the DOL did not directly address whether an employer must reimburse home expenses used in the course of telework, such as personal phone service or home internet service. The FLSA would not require an employer to reimburse an employee for personal costs related to internet access, etc., in order to work from home; however, if a certain internet speed or capability is required that the employee does not have, then those additional costs may be need to be reimbursed or covered by the employer. In addition, employers should determine any additional requirements imposed by applicable state law.

As a practical matter, if you require an employee to work remotely who is not normally set up to do so, you should consider whether you will need to reimburse the employee for any additional phone, internet, or other expenses incurred in order to enable the employee to telework at the company’s request where such costs are incurred beyond what the employee would have otherwise paid for his or her personal services.

Ogletree Deakins’ coronavirus team has covered various aspects of the 2019-nCoV outbreak and provided an overview of recent developments, tips from a workplace safety perspective, and information affecting international employers. The team will continue to monitor the evolving situation and report on the issues on our Coronavirus (COVID-19) Resource Center for Employers.